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No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Government's Brief in Opposition admits that there is a clear, recurring and irreconcilable conflict among the circuits on the issue of whether the Government's removal of the res from the district in a civil forfeiture case divests a court of jurisdiction unless a bond is posted or a stay pending appeal is ordered. Our

Petition cites eight 1991 appellate decisions addressing this issue.[1] With the dramatic increase in the number of civil forfeiture cases filed by the Government, this issue can be expected to recur with even greater frequency.

The Government takes inconsistent positions in its Brief on this issue. First, the Government refers to a rider attached to a Senate bill (subsequently dropped from the legislation) which would preserve appellate jurisdiction in forfeiture cases where the Government removes the property pending appeal. Second, the Government argues that the opinion of the Eleventh Circuit in this case was correct. On the one hand, it urges this Court not to resolve an admittedly irreconcilable conflict among the circuits on an important issue of appellate jurisdiction because legislation may pass and resolve the conflict. On the other hand, it has consistently urged in the circuit courts and now in this Court that the possible legislation is wrong and can be expected to oppose it. This is disingenuous at best.

This Court should resolve the issue presented. Congress has not resolved it and the Government's prediction that it might is pure speculation. A bill was introduced by Senator D'Amato on August 2, 1991, S.1665 102d Cong., 1st Sess., as to which no hearings were held and no action was taken. Cong. Rec. S-12,235-36. Senator D'Amato then offered the same bill as one of a large number of riders to S.543, the "Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991". Cong. Rec. S-16640. Many of the riders, including this one, were passed by the Senate on November 21, 1991. However, the riders were eliminated in Conference Committee on November 27, 1991. The resulting legislation, the "FDIC Improvement Act of 1991" was signed into law on December 19, 1991, without this rider. P.L.

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[1] Further illustrating how often this issue has arisen is that from 1984 to 1991, the Ninth Circuit alone issued seven published opinions on it: *United States v. $29,959 in United States Currency*, 931 F.2d 549 (9th Cir. 1991); *United States v. $84,740 in United States Currency*, 900 F.2d 1402 (9th Cir. 1990); *United States v. $10,000 in United States Currency*, 860 F.2d 1511 (9th Cir. 1988); *United States v. $2,490 in United States Currency*, 825 F.2d 1419 (9th Cir. 1987); *United States v. 66 Pieces of Jade and Gold Jewelry*, 760 F.2d 970 (9th Cir. 1985); *United States v. United States Currency in the Amount of $110,000*, 735 F.2d 326 (9th Cir. 1984); *United States v. $57,480.05 in United States Currency*, 722 F.2d 1457 (9th Cir. 1984).

102-242, 105 Stat. 2236. Congress adjourned without taking any action on S.1665.

The Government suggests, on this record, that consideration of the Petition is "premature." The Government's position is that at some uncertain future time, S.1665 might be referred to Committee, be voted favorably out of Committee, pass the full Senate, survive a conference and become law. There is no reason to have confidence in that prediction. Whether that will happen is pure guesswork. Congress can always pass laws on most of the issues that are presently pending before the federal courts.[2] It is, however, not appropriate for the courts to decline to take jurisdiction over a case because of speculation of possible future congressional action. It is especially inappropriate in this case to decline jurisdiction where the issue presented relates to a judge made rule of appellate jurisdiction.

The Government argues that the Petition should be denied because the Petitioner should have obtained a stay pending appeal. This is, of course, an inappropriate argument on the merits, rather than on this Court's certiorari jurisdiction. It is an argument squarely rejected by four of the Circuit Courts of Appeal (Petition at pages 7-10). It is also an unrealistic argument, for it presupposes that the district courts will routinely enter a stay in the ten days between the time a final judgment is entered and the automatic stay provided in Rule 62(a), Fed.R.Civ.P. expires,[3] or that the courts of appeal will routinely act quickly and favorably on emergency petitions for review of district court rulings denying stay relief. Even if the Government's suppositions were accurate, the Brief in Opposition supports a "rule" which: (a) requires emergency action by overburdened federal trial and appellate courts; (b) effectively alters the time to appeal a forfeiture judgment; and (c) most importantly, makes appeals

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[2] Whatever action Congress may take in the future to correct the result below will be of no assistance to this litigant, whose only recourse is to this Court.

[3] *But see, Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), in which the trial court ordered disbursement of the funds from the court registry and denied an emergency motion to prevent disbursement pending an appeal of an *in rem* judgment. The funds were disbursed, and the Eleventh Circuit dismissed the appeal for lack of jurisdiction.

from forfeiture judgments dependent on discretionary district court rulings.[4]

The other "merits" argument asserted by the Government is its lengthy and irrelevant statement of the facts as found by the district court on the innocent owner defense. The Brief in Opposition neglects to state that on appeal, Petitioner challenged as clearly erroneous many of these "facts", and also urged reversal because the district court applied the wrong legal standard. Because the Eleventh Circuit dismissed the appeal, these issues were never addressed. Should this Court grant the Petition and reinstate the appeal, the Eleventh Circuit will have the opportunity to consider the merits of these issues for the first time.

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[4] Rule 4(a), Fed.R.App.P. provides that one may take an appeal within 30 days of the entry of a final judgment. In a forfeiture case, the Eleventh Circuit ruling requires the appellant to obtain a stay or post a bond no later than 10 days after entry of judgment, or the Government can effectively prevent an appeal from being taken by removing the res. Even if a stay is sought within ten days, the Government may unilaterally act to prevent an appeal if the district court does not act in time. The appellate rights of parties who cannot afford to post a bond are left to the discretion of the district and appellate courts on whether to grant a stay. These are but a few of the consequences of the "rule" the Government has assured this Court is correct.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, this Court should grant the petition for writ of certiorari, vacate the judgment below, and order the Eleventh Circuit to reinstate Republic's appeal.

Respectfully submitted,

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